From: Pereira, Sandra
To: MCP-Chair; eegirard@lerchearly.com; Hamid Shirazi
Cc: Butler, Patrick; Zelaya, Ariel
Subject: Staff's Response to Petition of Appeal of Denial of NRI/FSD No. 420240850
Date: Wednesday, October 16, 2024 5:48:52 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
A Notice of Requirements dated February 12, 2024.pdf
B Extension for NRI-FSD Application No. 420240850 Notice of Requirements dated February 21, 2024.pdf
C Applicant's letter dated March 26, 2024.pdf
D Applicant's letter dated March 31, 2024.pdf
E Staff's PowerPoint presentation NRI 420240850 Persimmon Tree Road 02082024.pdf
F Maryland Department of the Environment Letter dated January 5, 2024.pdf
G NRI-FSD Denial Letter dated August 16, 2024.pdf
H Director's response to the Applicant"s request to reconsider dated July 23, 2024.pdf
Staff's Response to Petition of Appeal of Denial of NRIFSD No. 420240850.pdf

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Good afternoon,

Attached hereto is Staff's Response to Petition of Appeal of Denial of NRI/FSD No. 420240850.

Thank you,
Sandra

Montgomery Planning

Sandra Pereira, RLA
Regulatory Supervisor, Upcounty Planning Division

Montgomery County Planning Department
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Montgomery Planning

APPEAL OF PERSIMMON TREE SUBDIVISION NATURAL RESOURCES INVENTORY/ FOREST STAND DELINEATION NO. 420240850

Description

Staff Response to the Appeal of Denial of Natural Resources Inventory/Forest Stand Delineation No. 420240850 for Persimmon Tree Subdivision.

No. 420240850

Completed: 10-16-2024

MCPB
Item No.
10-31-2024

2425 Reedie Drive
Floor 14
Wheaton, MD 20902

Planning Staff

AZ Ariel Zelaya, Planner II, Down County Planning, ariel.zelaya@montogomeryplanning.org, 301-495-4509

SP Sandra Pereira, Supervisor, Upcounty Planning, Sandra.Pereira@montgomeryplanning.org, 301-495-4513

PB Patrick Butler, Chief, Upcounty Planning, Patrick.Butler@montgomeryplanning.org, 301-495-4561

LOCATION/ADDRESS

9312 Persimmon Tree Road and

9810 Newhall Road, Potomac

ZONE

R-200

PROPERTY SIZE

2.43 acres

APPLICANT

Mr. Hamid Shirazi

APPEAL DATE

September 16, 2024

Summary:

- Staff's position is to deny the appeal and uphold the Planning Director's denial of the Natural Resources Inventory/Forest Stand Delineation ("NRI/FSD") No. 420240850 for Persimmon Tree Subdivision.
- By letter dated August 16, 2024, the Planning Director issued a denial of the NRI/FSD based on failure to show an existing intermittent stream and associated buffer on the Property.
- On September 16, 2024, the Applicant submitted an Appeal of the denial of the NRI/FSD pursuant to Chapter 22A-20(c) alleging that the stream is not an intermittent stream but an ephemeral stream with no buffer requirement.

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SECTION 1: PROCEDURAL OVERVIEW

OVERVIEW

As a precursor to development requiring a Forest Conservation Plan or Forest Conservation Law Exemption, an applicant must submit a Natural Resources Inventory / Forest Stand Delineation ("NRI/FSD" or "NRI") to be reviewed and approved by Planning staff. All streams and/or drainage courses located on or within 200 feet of a subject property must be shown on the NRI/FSD summary map. The Environmental Guidelines approved by the Planning Board (2021) identify different types of streams – perennial, intermittent, and ephemeral – and provide criteria for Planning Staff to characterize streams and apply the appropriate buffer in order to protect sensitive environmental resources near these waterways.

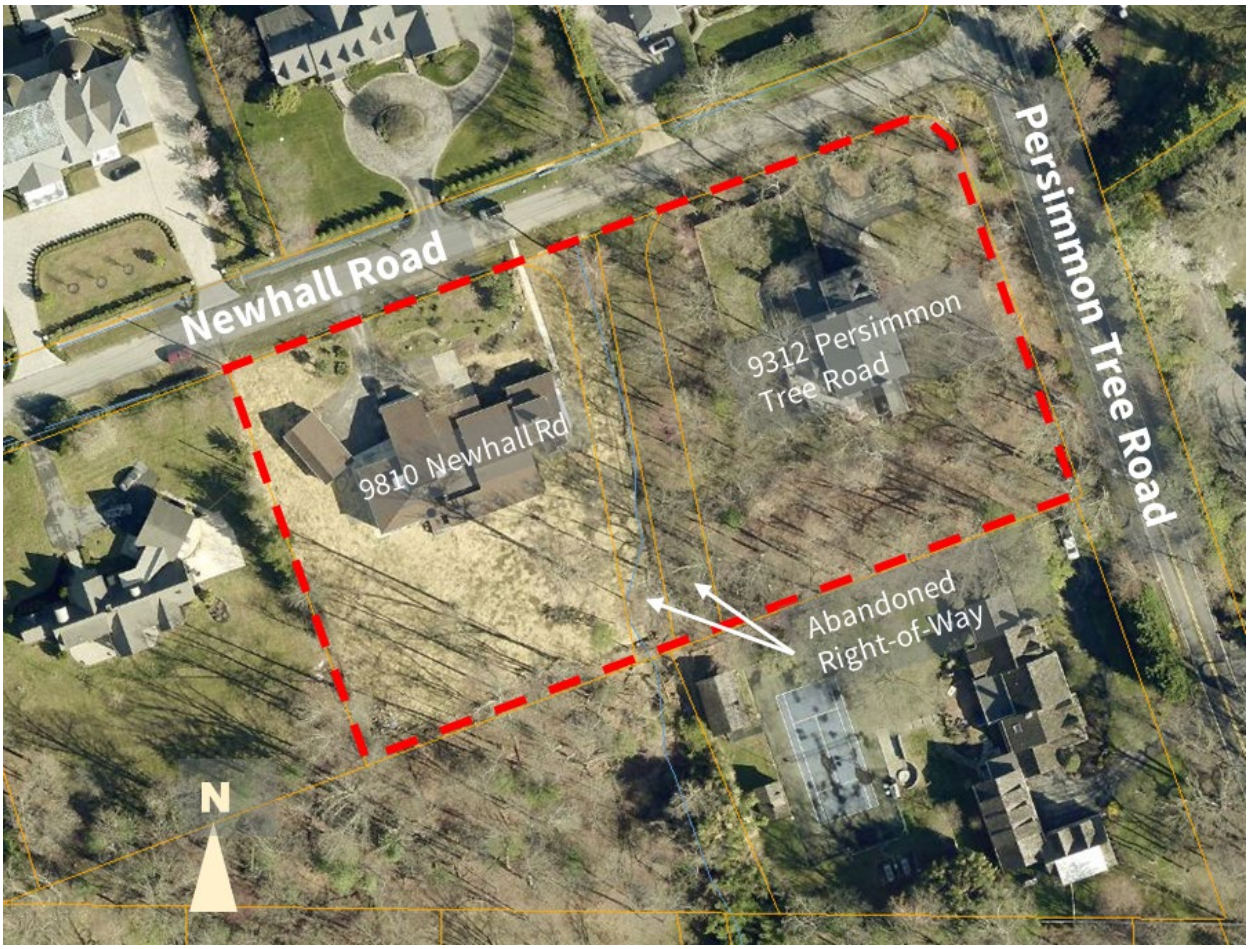


Figure 1. Property of NRI/FSD No. 420240850 outlined in red

At issue in this appeal is whether an intermittent stream exists on the parcel of land (which is abandoned right-of-way containing 5,905 square feet pursuant to Equity Case 29165) located in between 9810 Newhall Road and 9312 Persimmon Tree Road and thus must be shown on the NRI/FSD. If the Planning Board decides there is an intermittent stream, the Applicant must revise their NRI/FSD to identify the stream and provide a 150-foot stream valley buffer on either side as Planning staff has directed. No disturbance would be permitted within that buffer under the Environmental Guidelines. If the stream does not meet the definition of an intermittent stream and is instead an ephemeral stream, as the Applicant argues, the stream delineation on the NRI/FSD submitted by the Applicant is correct and no stream valley buffer is required.

PROCEDURAL HISTORY

In December of 2022, an inspector from the Department of Permitting Services ("DPS") visited the property and observed excavation occurring in the stream in the abandoned right-of-way in preparation of installing a drainage pipe. The DPS inspector issued a Notice of Violation to the Applicant on December 2, 2022. At the advice of a DPS permit reviewer, the Applicant applied for a Small Land Disturbance Activity ("SLDA") Permit on December 2, 2022, to address the pending violation and to allow the installation of a double 18-inch pipe in the stream area on the abandoned roadway parcel. In reviewing the SLDA permit application, the DPS permit reviewer checked GIS maps of the property and noted that it appeared as though the pipe would be only picking up run-off from upstream lots but did not consider that the channel was an unclassified stream. DPS approved SLDA Permit No. SC288894 on December 9, 2022. Because the parcel is under 40,000 square feet and the amount of disturbance did not trigger County Forest Conservation Law, no forest conservation review or environmental review was required for the issuance of the permit. After the permit was issued, the Applicant installed an 18-inch drainage pipe on the stream.

On December 28, 2022, the Applicant filed an application for a Forest Conservation plan exemption no. 42023119E for proposed improvements on the adjacent lot at 9810 Newhall Road. The Property Owner's application for exemption no. 42023119E showed an intermittent stream on the property, and the project description narrative described the water "daylighted where it naturally flows currently in the back of the property." The Applicant was instructed to provide an NRI/FSD in order to confirm the existence of a stream before the Exemption could be completed. However, this NRI was never submitted and the application was withdrawn. Subsequent development activity on the property at 9810 Newhall Road without approval of the Forest Conservation Exemption is the subject of a separate pending enforcement proceeding and not before the Board at this time.

On October 3, 2023, the Applicant filed Concept Plan No. 520240040 for 9312 Persimmon Tree Road and 9810 Newhall Road with the portion of abandoned right-of-way in between the two lots, and related NRI/FSD No. 420240850, which is at issue in this appeal. Through review of the NRI/FSD application, Planning staff noted that the ephemeral stream shown on the current NRI conflicted with

the prior submission, which acknowledged that an intermittent stream existed on the property. Planning staff visited the property on November 14, 2023 and observed flow and other characteristics of an intermittent stream. Based on these observations at the site, Planning staff provided comments on the NRI/FSD application, raising the concern that the stream on the property is intermittent and requested that the Applicant seek further information from the Maryland Department of the Environment ("MDE") about whether the stream was within their jurisdiction. As described in a letter dated January 5, 2024 [Attachment F], MDE visited the property on December 21, 2023, and observed a small amount of flow and visited again on January 5, 2024, this time observing no flow from the pipe. MDE's letter described the observation on site and concluded that it does not consider the drainage pipe to be within its jurisdiction. In its letter, MDE did not address the criteria for determining whether the stream was ephemeral or intermittent contained in the Environmental Guidelines.

Planning staff remained concerned that the stream on the property was incorrectly characterized on the NRI/FSD under review and met with the Applicant's development team on February 8, 2024 to present the photographic and video evidence that staff reviewed to come to the conclusion that an intermittent stream exists on the property. Subsequent to the meeting, Planning staff issued a letter to the Applicant, reiterating the determination of an intermittent stream and requiring revision of the NRI/FSD in order to move forward with its approval.

On April 25, 2024, Planning staff -- a group of five environmental reviewers -- visited the property again to gather information and observed a small amount of flow, wetland vegetation, and topography signifying an intermittent stream.

The Applicant requested that the Planning Director reconsider the stream determination in a letter dated May 31, 2024, including two reports from consultants providing their analysis of the stream's characteristics [Attachment D]. The Planning Director weighed the evidence and argument provided by the Applicant against the evidence provided by Planning staff and declined to reconsider the determination, finding that Planning staff correctly applied the criteria and methodology established by the Environmental Guidelines to determine that an intermittent stream exists on the Property, supported by observations taken from the site, photographs, videos, GIS data, and information established by other regulatory approvals, as further discussed in Section 3 below.

The Applicant again declined to revise the NRI/FSD to show the intermittent stream, and the Planning Director issued a denial of the NRI/FSD on August 16, 2024 [Attachment G].

STANDARD OF REVIEW

Montgomery County Forest Conservation Law, Section 22A-20(c), provides the right for an Applicant to appeal "forest stand delineations, exemptions from Article II, and forest conservation plans reviewed by the Planning Director" to the Planning Board. When such an appeal is filed, the Planning Board

must “hold a de novo hearing on the appeal” and “adopt a written resolution explaining its decision,” pursuant to Section 22A-20(c)(2).

In a de novo hearing, the Planning Board acts as the finder of fact and gives no deference to the administrative decisions made prior to its review of the case. The Planning Board must weigh the evidence and testimony presented during the hearing and articulate its decision on the issue in a written resolution. The Board’s resolution is considered the final agency action, for the purpose of judicial review, and an applicant may seek judicial review of the decision in the Circuit Court under the applicable Maryland Rules of Procedure governing judicial review of administrative agency decisions, under Section 22A-20(c)(3).

SECTION 2: SITE DESCRIPTION

The NRI/FSD no. 420240850 encompasses the property at 9312 Persimmon Tree Road and 9810 Newhall Road and a portion of abandoned right-of-way in between the two lots, in the southwestern area of the Potomac community as identified in the 2002 *Potomac Subregion Master Plan* (“Master Plan”). The Property is generally located south of Potomac Village, north of the TPC at Avenel Golf Course, and east of the Heritage Farm Neighborhood Park. The Property is located in the southwest quadrant of the intersection of Newhall Road and Persimmon Tree Road (Figure 2).

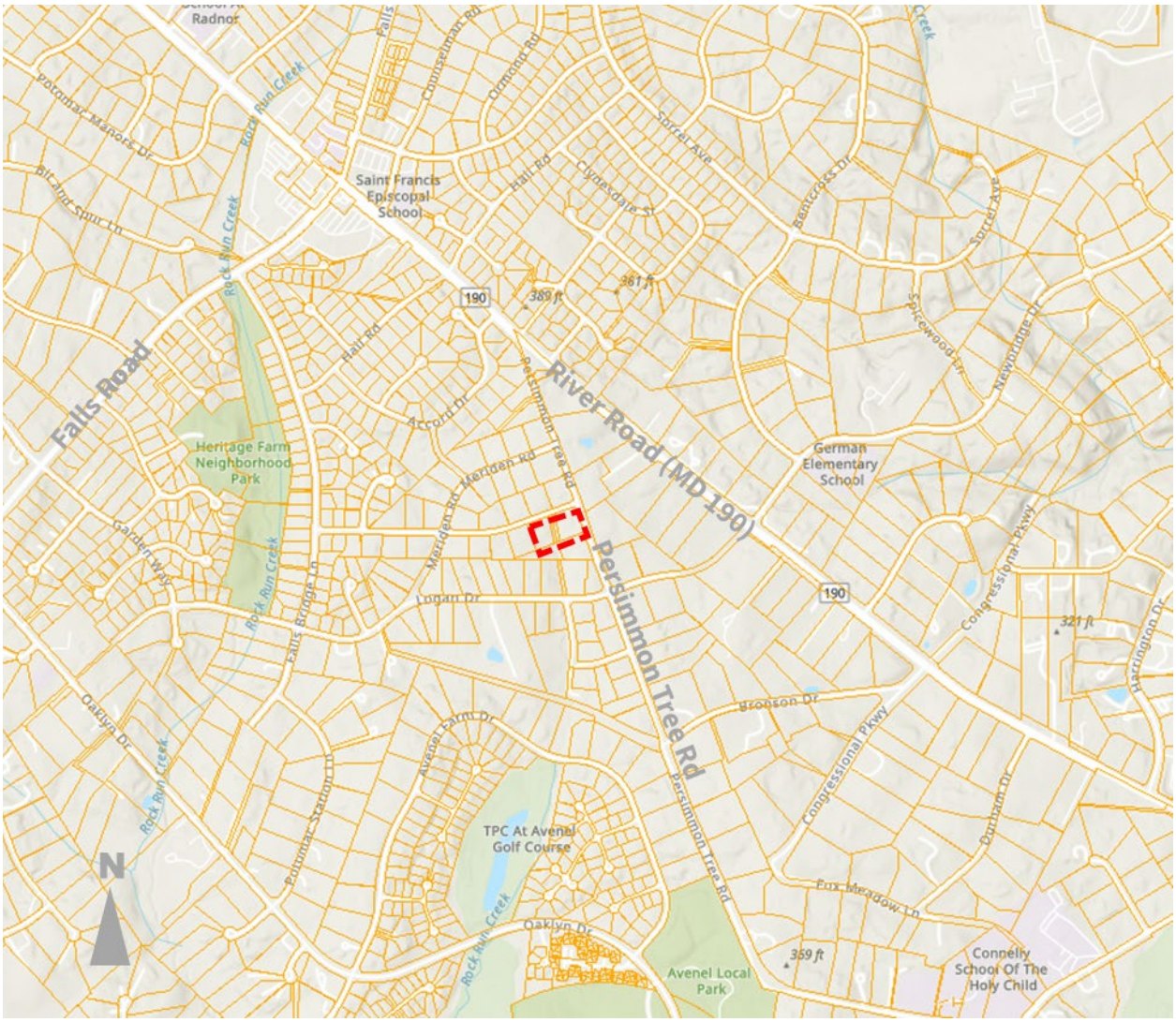


Figure 2. Vicinity Map

PROPERTY DESCRIPTION

The 2.43-acre Property consists of Lot 1, Block C and Lot 1, Block D of River Road Estates, as shown on Plat No. 1667 in the Land Records of Montgomery County. In addition, the Property also includes a portion of abandoned right-of-way in between the two lots. The Property is zoned R-200 (Residential) and is subject to the policies and recommendations of the Master Plan. The Property has approximately 464 feet of frontage on Newhall Road and approximately 250 feet of frontage on Persimmon Tree Road. It is improved with two detached houses and respective driveways.

SECTION 3: ARGUMENT, FINDINGS AND ANALYSIS

STREAMS – DEFINITIONS AND CRITERIA FOR DELINEATION

Environmental Guidelines for Management of Development in Montgomery County (2021)

The Environmental Guidelines provide a framework for existing policies and guidelines to protect sensitive natural resources during the development process. These guidelines present environmental management strategies and criteria for Staff use in reviewing the elements of development proposals and formulating recommendations to the Planning Board. The guidelines indicate those conditions that are acceptable for project approval under most circumstances. Through the identification of existing natural resources and the application of these guidelines, it will be possible to achieve a balance between accommodating the level of development permitted through zoning and protecting the County's existing natural resources.

Intermittent Stream – Definition and Criteria

In the Environmental Guidelines, intermittent streams are defined as follows:

> **Intermittent streams** -- streams that typically have baseflow at least once per year. Typically, in the winter and spring, the groundwater table is elevated, increasing the likelihood that the groundwater level is higher than the bed of a stream channel. Therefore, an intermittent stream will usually have baseflow during the winter and spring seasons and infrequent baseflow during the rest of the year. Because of discontinuous flow regimes, intermittent streams typically have physical, hydrological, and biological characteristics that are not as well-developed as perennial streams. Depending on the frequency and duration of flows, however, the characteristics of intermittent streams can be similar to those of either perennial or ephemeral streams. (p. 53)

Appendix E of the Guidelines provides more detailed guidance on classifying streams through analysis of "physical, hydrological, and biological characteristics." The Guidelines provide that:

> To determine the characteristics of a stream and to help classify the stream type, data and observations should be collected in the field, as well as from already documented information. Previously approved NRI/FSDs or plan drawings for the subject site or for nearby sites may provide useful information on land features, including streams, that exist on or near the subject site. If available, historical flow and biological monitoring data may be checked to supplement field data. In addition, mapped information, such as topographic and soil maps, Geographic Information System (GIS), and fine resolution Light Detection and Ranging (LIDAR) can also be used as preliminary data sources. However, such maps are generally not based on detailed stream data and must be supplemented with data acquired in the field. (p. 67)

The Environmental Guidelines provide a list of characteristics typically present in intermittent streams:

- Baseflows present in the channel at least once per year
- Baseflow present in the channel throughout the year
- Sinuous channel
- Very well-defined channel banks and bed that include riffles and pools
- Evidence of fluctuating high-water marks, such as sediment-stained leaves, blackened or decaying leaf litter, bare ground, or vegetation drift lines
- Evidence of soil and debris movement (scouring) in the channel.
- Leaf litter is transient or temporary in the channel.
- Wetland or hydrophytic vegetation may be present
- Stream bank soils with hydric indicators at or above the low flow conditions
- Seeps, springs, or wetlands may be adjacent to or feed into the stream channel
- Aquatic fauna present when there is surface flow; during dry periods, signs of the presence of stream biota at other times of the year
- Algae-covered or water-stained rocks
- Channel head-cuts at the beginning of intermittent streams may be, but are not always, present
- Sorted sediments (p. 69)

Ephemeral Stream – Definition and Criteria

In the Environmental Guidelines, ephemeral streams are defined as follows:

> **Ephemeral streams** -- streams that are above the groundwater table and convey flow only during, and for a short duration after (generally less than 48 hours), and in direct response to, a precipitation event. Ephemeral streams do not include roadside ditches. (p. 52)

Appendix E of the Environmental Guidelines also provides a list of characteristics typically present in ephemeral streams:

- Poorly-developed sinuosity
- Evidence of leaf litter or small debris jams in flow areas
- Poorly-sorted sediments
- Poorly-developed removal of vegetation litter
- Poorly-developed vegetation drift lines
- Fibrous roots in channel
- Side slope soils with characteristics typical of the surrounding landscape (p. 70)

The following characteristics are typically absent in ephemeral streams:

- Moderate to well-developed sinuosity
- Blackened or decayed leaf litter

- Well-sorted sediments
- Streambed forms (such as riffles/pools, runs, point bars)
- Frequent-flow marks, algae covered or water-stained or lined rocks
- Obligate wetland vegetation along or in channel
- Hydric soils in or adjacent to channel
- Streamflow (except during or briefly (≤ 48 hrs.) after storms)
- Alluvial deposits
- Natural levees
- Floodplains
- Evidence of stream biota (e.g., fish, stream salamanders, or aquatic macroinvertebrates) (p. 70).

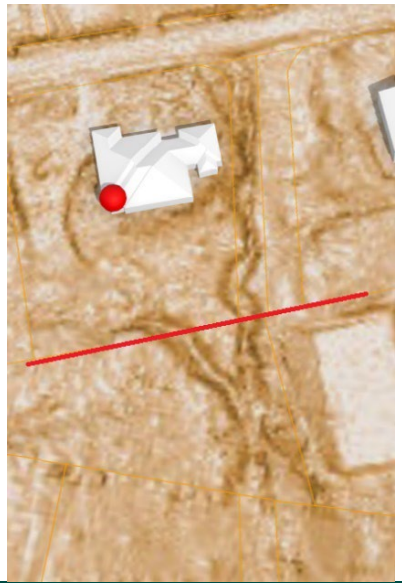
The Environmental Guidelines acknowledge that "it can sometimes be difficult to place a stream into a specific type because not all of the characteristics may be present, and characteristics can overlap and vary based on time of year and weather conditions" but that "best professional judgment must be applied when classifying a stream." (p. 67).

STREAM DELINEATION FINDINGS AND ANALYSIS

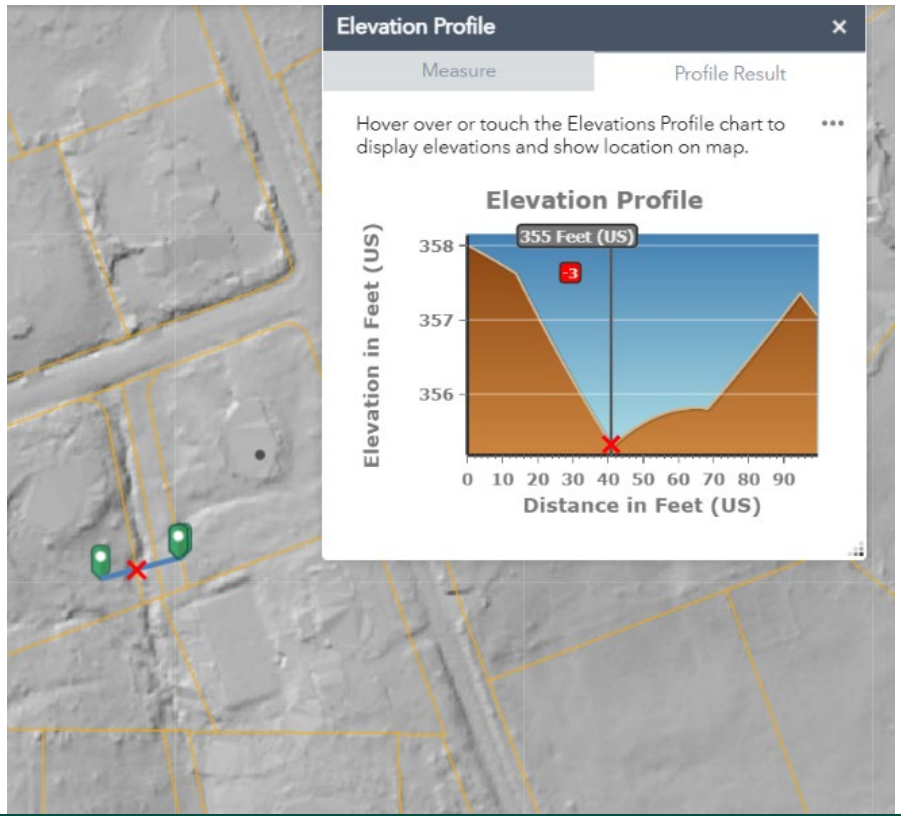
During the review process, the following factors to delineate a stream were found on the property and/or the adjoining property, as demonstrated below (Additional visual evidence is provided in Section 5 below):

1. Baseflows: Observed baseflows within the channel indicate the presence of flowing water at least once per year. This suggests a sustained source of water feeding the channel (Figure 3) Field Visit by Planning Staff on April 25, 2024.

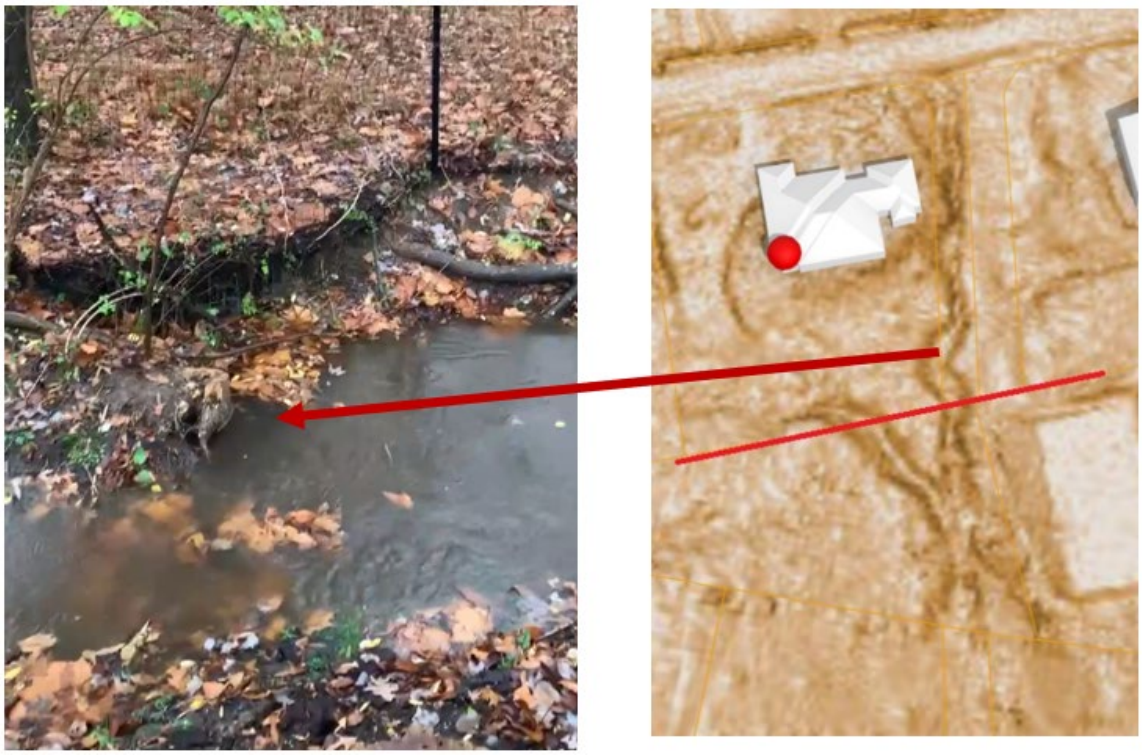
2. Sinuous Channel: The channel exhibits a sinuous (winding) form, typical of streams that have been shaped by flowing water over time (Figure 4)



3. Well-Defined Channel Banks and Bed: The channel possesses clearly defined banks and bed, including riffles (shallow, fast-flowing sections) and pools (deeper, slower-moving sections). This morphology is characteristic of streams (Figure 5)



4. Fluctuating High-Water Marks: Evidence of fluctuating water levels is present, as indicated by sediment-stained leaves, blackened or decaying leaf litter, bare ground along the banks, and vegetation drift lines. These features suggest periodic inundation by the stream (Figure 6)



5. Evidence of Scouring: Signs of soil and debris movement (scouring) within the channel were observed. This indicates the erosive power of flowing water (Figure 7)

6. Transient Leaf Litter: Leaf litter within the channel appears to be transient or temporary, suggesting periodic flushing by stream flows (Figure 8)

7. Potential Wetland or Hydrophytic Vegetation: The presence of wetland or hydrophytic (water-loving) vegetation further supports the identification of a stream (Figure 9)

8. Hydric Soil Indicators: Stream bank soils exhibit hydric indicators at or above the low flow conditions. Hydric soils are formed under conditions of saturation, flooding, or ponding, which is consistent with the presence of a stream (Figure 10).

9. Underground Water Presence[1]: Physical presence is evidenced by saturated soil or water welling up from the ground (Figure 11).

10. Algae-cover or Water-stained Rocks[1] (Figure 12).

The most important criteria staff looks for is the presence of groundwater. To determine whether groundwater is present, staff evaluates a channel at multiple points along its length and looks at conditions outside of the channel as well. A soil probe is used to examine the surface and subsurface of the soil to determine whether groundwater is present or there are physical changes due to the past presence. Physical presence is evidenced by saturated soil or water welling up from the ground (Figure 11). Physical changes are seen in changes to the coloring of the soil due to redox reactions caused by water saturation. A Munsell book is used to describe these changes, when necessary. Several staff members were involved in ensuring that this determination was consistent with previous determinations. No rain had fallen in the 48 hours preceding the fieldwork on April 25, 2024 (Table 1. Precipitation Data, April 2023). Therefore, any observed flow was not due to precipitation but instead related to groundwater.

NRI/FSD APPLICATION

On October 5th, 2023, Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) No. 420240850 was filed. During the review process, the environmental staff identified issues with the NRI/FSD application for the Persimmon Tree Subdivision. After careful review, Staff identified the clearing of forested areas within a stream valley buffer and the burial/piping of an intermittent stream that need to be addressed to meet the requirements for approval.

During the review process and the initial field visit on November 14, 2023, the Planning Staff observed that certain highly sensitive environmental features had recently been altered, presumably by the Applicant. Specifically, forested areas within a stream valley buffer had been cleared, and an intermittent stream had been buried/piped. These actions conflict with the law, regulations, and guidelines outlined in the Forest Conservation Law Chapter 22A, Trees Approved Technical Manual 1992, and the Environmental Guidelines for Management of Development in Montgomery County 2021.

Per the Environmental Guidelines, intermittent streams have baseflow at least once per year. In the winter and spring, the groundwater table is typically elevated, increasing the likelihood that the groundwater level is higher than the bed of a stream channel. Therefore, an intermittent stream will usually have baseflow during the winter and spring seasons and infrequent baseflow during the rest of the year. Because of infrequent flow regimes, intermittent streams typically have physical, hydrological, and biological characteristics that are not as well-developed as perennial streams.

Field data, documentation (video and pictures), and other Forest Conservation Plan Exemptions nearby have confirmed the presence of previous critical environmental features on the property, such as a stream and the associated buffer that were recently disturbed. This evidence is further supported by topographic, hydrologic, and soil maps, Geographic Information Systems (GIS), and fine-resolution Light Detection and Ranging (LIDAR) data. Consequently, the Applicant was informed that they must submit a revised application for NRI/FSD. The revised application should include new and old environmental features, such as (but not limited to) showing a stream and its associated buffer, as well as cleared canopy forest within the stream valley buffer area, consistent with the Forest Conservation Law Chapter 22A, Trees Approved Technical Manual 1992, and the Environmental Guidelines for Management of Development in Montgomery County 2021.

During the review process of the NRI/FSD, Planning staff noted the key physical features to properly identify the intermittent stream include sinuosity (Figure 4), well-defined banks (Figure 5), deposits, sediments, debris, the presence of wetland vegetation (Figure 9), soil, and hydric indicators (Figure 10). When evaluating channels to determine whether they are ephemeral or intermittent, staff uses a number of criteria to make a technical decision. These criteria include sediment sorting, channel characteristics, and vegetative clues. Planning staff provided a PowerPoint presentation (Attachment E), which was subsequently shared with the meeting participants and included photographs and videos from the property supporting their determination. The photographs, videos, and Staff observations from the property demonstrate that prior to the disturbance (i.e., the installation of two pipes), the stream and its banks were well-defined.

On February 12, 2024, the staff issued a Notice of Requirements (Letter prior to the denial notice with the intention to let the applicant know how they could address environmental concerns) for the NRI/FSD # 420240850- Persimmon Tree Subdivision [Attachment A]. The purpose of the notice of requirements was to ensure that the Applicant understood how to address environmental concerns

and comply with the Forest Conservation Law Chapter 22A, Trees Approved Technical Manual 1992, and the Environmental Guidelines for Management of Development in Montgomery County 2021.

The Applicant hired a consultant to evaluate the environmental concerns raised by Staff during the NRI review process. However, the two consulting companies failed to address the specific property referenced. Instead, they addressed the adjoining property where the Planning staff had already identified an intermittent stream per site visited on April 25, 2024, and approved NRI/FSD numbers 42010200E, 42021194E, and 42011034E, dated May 28, 2010, April 6, 2021, and August 9, 2010, respectively. Furthermore, the consultants hired by the Applicant consistently used a different method to define streams, a method that is used in North Carolina but not in Montgomery County. As mentioned in the Director's response letter provided by the Planning staff on July 23, 2024[Attachment H], the report and evidence provided by the Applicant and the two consulting companies were not sufficient to change the Staff's position on the stream delineation.

DENIAL OF NRI/FSD NO. 420240850

In the Stream Delineation Findings and Analysis section and the Notice of Requirements (Attachment A), it was previously discussed that field data, documentation (video and pictures), and other Forest Conservation Plan Exemptions nearby have confirmed the presence of previous critical environmental features on the property. These features include a stream and the associated buffer, which were recently disturbed. Topographic, hydrologic, and soil maps (Including USGS maps Figure 13), Geographic Information Systems (GIS), and fine-resolution Light Detection and Ranging (LIDAR) have also been used to verify the extent of the stream and forest that have been disrupted.

Planning staff provided a detailed overview of the review of the Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) and the factors supporting the determination of an intermittent stream. Planning staff noted the key physical features to properly identify the intermittent stream, including sinuosity, well-defined banks, deposits, sediments, debris, the presence of wetland vegetation, soil hydric indicators, and algae cover. Planning staff provided a PowerPoint presentation (Attachment E), which was subsequently shared with the meeting participants and includes photographs and videos from the Property used to support its determination.

The photographs, videos, and staff observations from the property demonstrate that prior to the disturbance (i.e., the installation of two pipes), the stream and its banks were well-defined. Additionally, Planning staff created a 3D model using LIDAR data and a contour layer to demonstrate the presence of a well-developed channel with clear sinuosity, continuous bed, and bank throughout the natural channel's length, excluding the concrete channel between 9805 Logan Drive and 9901 Logan Drive. The model and the video previously provided by the applicant, clearly show sinuous patterns in the terrain. The video also shows flow during a heavy rain event. During site visits on November 14, 2023, and April 25, 2024, Planning staff found evidence of stream flow (Figure 3); the staff used a soil probe to examine the surface and subsurface soil to determine whether groundwater

was present. Staff confirmed previous delineations, such as an intermittent stream on the adjoining property, which is cross-referenced by the USGS map (Figure 13), showing that the beginning of the upper stream did start on Mr. Shirazi's property. Water pools were present, evidencing saturated soil and water welling up from the ground. Additionally, the 3D model also depicts evidence that stream banks were up to 2 feet high. Soil and core samples were collected during the site visits for groundwater testing, and observations included decayed leaf matter, sorted sediments, streambed forms, frequent flow marks, algae cover, and wetland vegetation. Evidence of erosion in the form of exposed vegetation roots along the banks, sediment, and debris was observed at 9306 Persimmon Tree Rd and the outfall of the pipes during Planning staff visits. Wetland vegetation such as (Figure 9)and algae-covered rocks were identified along the stream channel. Groundwater (Figure 10) was also noted during the Department of Permitting Services (DPS) inspection (pictures provided by DPS on December 2, 2023), and various hydrologic conditions, such as the presence of muck and accumulation of organic matter within a few inches of the topsoil on the stream banks were also observed. MDE letter [Attachment F] mentioned finding water flow on December 21, 2023, but noted that it was deemed likely due to precipitation. The National Weather Service records (Table 3. Precipitation Data, December 2023) for the area did not show any precipitation in the 48 hours prior to MDE's visit.

The evidence above indicates that the channel was well-defined, and a small flow was present during multiple visits (which included DPS, MDE, and Planning Staff visits) and exhibited the characteristic sinuosity of intermittent and perennial streams.

As defined in the Environmental Guidelines updated and approved by the Montgomery County Planning Board in 2021, intermittent streams "typically have baseflow at least once per year" and "will usually have baseflow during the winter and spring seasons." The Applicant's argument and evidence focus on the second part of the definition, which states that an intermittent stream will usually have baseflow during the winter. However, the first part of the definition is equally important, which states that intermittent streams have baseflow at least once per year. Planning staff has visited the site multiple times, with the most recent visit being on April 25, 2024. During that visit, water flow was observed on the Property, and the National Weather Service records (Table 1. Precipitation Data, April 2023) for the area do not show any precipitation in the 72 hours before the Planning staff's visit.

Additionally, pictures from the DPS staff site visit on December 2, 2022, showed water ponding/accumulation in the channel being trenched (Figure 10. Hydric Soil Indicators). The National Weather Service records (Table 2. Precipitation Data, December 2022) for the area show zero precipitation in the two days before the DPS site visit (and no more than 0.25 inches of precipitation in the 24 hours starting 4 hours before the site visit). This suggests that the work being executed found seeps, springs, or wetland areas that were disturbed within the stream bed channel during the construction, causing the water to emerge from the ground. These features are currently observed on the adjacent property at 9306 Persimmon Tree Road. This evidence supports the

determination that before the pipes were installed on the Property, there was a stream meeting the definition of "intermittent stream," as provided in the Environmental Guidelines.

APPLICANT'S ARGUMENTS AND STAFF REBUTTAL

In appealing the denial of the NRI/FSD, the Applicant presents the following arguments:

1. Staff's determination relied on conclusive statements and insufficient evidence:

i. **Staff's position:** Planning staff provided enough evidence to support the existence of an intermittent stream on the property, as explained in Section 3 and supported by visual evidence in Section 5 of this report.

ii. Applicant's position: Planning staff did not provide enough evidence to support its claims.

2. The Maryland Department of the Environment ("MDE") letter confirms that the stream is ephemeral:

i. **Staff's position:** MDE issued a letter dated January 5, 2024 [Attachment F] with the finding that the drainage pipe as it currently exists on the Property is not considered a "Water of the State." Under Section 5-101 of the Environmental Article of the Maryland Code, a "Water of the State" includes:

> (1) Both surface and underground waters within the boundaries of the State subject to its jurisdiction;
>
> (2) That portion of the Atlantic Ocean within the boundaries of the State;
>
> (3) The Chesapeake Bay and its tributaries;
>
> (4) All ponds, lakes, rivers, streams, public ditches, tax ditches, and public drainage systems within the State, other than those designed and used to collect, convey, or dispose of sanitary sewage; and
>
> (5) The floodplain of free-flowing waters determined by the Department on the basis of the 100-year flood frequency.

Waters that fall within this definition are within MDE's jurisdiction to regulate and protect.

While Planning staff takes MDE's findings into consideration, they did not address the nature of the stream as it existed before the pipe was installed,

which is the primary issue for Planning staff's determination. Therefore, although MDE did provide input on jurisdictional issues relevant to their review, stream delineation for ephemeral and intermittent streams and their associated buffer is solely the responsibility of the Montgomery County Planning Department, using the 2021 Environmental Guidelines approved by the Montgomery Planning Board.

ii. **Applicant's position:** Instead of this third-party evaluation resolving the issue, as had been expected, Staff responded to MDE's letter on January 20, 2024. Staff requested to remove the letter from the submitted NRI/FSD.

3. Reports provided by two independent experts evaluated the stream and determined it was ephemeral under North Carolina Division of Water Quality 2010 Methodology for Identification of Intermittent and Perennial Streams and their Origins (Version 4.11, North Carolina Department of Environment and Natural Resources, Division of Water Quality, Raleigh, NC):

    i. **Staff's position:** The information is irrelevant mainly because the methodology used by the consulting company differed from that applied consistently by Planning staff in making stream delineations under the Environmental Guidelines. Please note that the consulting company mentioned in Exhibit "D" that "While we recognize that every site is unique, and site visits and professional judgments are subjective." Five environmental planners visited the property to confirm the existence of an intermittent stream, using the 2021 Environmental Guidelines approved by the Montgomery Planning Board, on the adjacent property and consistently used on every development application in Montgomery County.

    ii. **Applicant's position:** The North Carolina methodology goes further by quantifying each individual stream characteristic and providing a standardized score that delineates a stream as either ephemeral, intermittent or perennial.

SECTION 4: CONCLUSION

Staff's position is to deny the appeal and uphold the Planning Director's denial of NRI/FSD No. 420240850 for Persimmon Tree Subdivision. The Application does not satisfy all applicable requirements of the Forest Conservation Law, Montgomery County Code, Chapter 22A, and does not comply with the Montgomery County Planning Department's Environmental Guidelines. As discussed above, Planning staff has determined that the Application cannot be approved without revisions to the NRI/FSD to show the presence of an intermittent stream and associated buffer on the property. The NRI/FSD application must be revised to include all environmental features such as, but not

limited to, intermittent stream and its associated buffer, as well as cleared canopy forest within the stream valley buffer area.

SECTION 5: VISUAL EVIDENCE

This section includes visual evidence confirming the presence of an intermittent stream and associated buffer on the property consistent with the criteria in APPENDIX E of the **Environmental Guidelines 2021**.

Figure 3. Baseflow (Field Visit by Planning Staff on April 25, 2024)

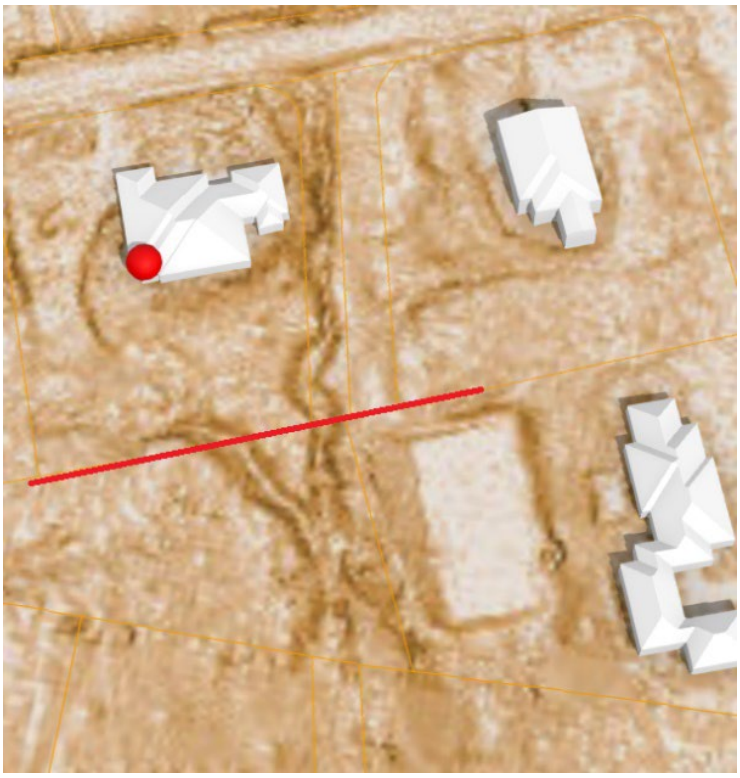
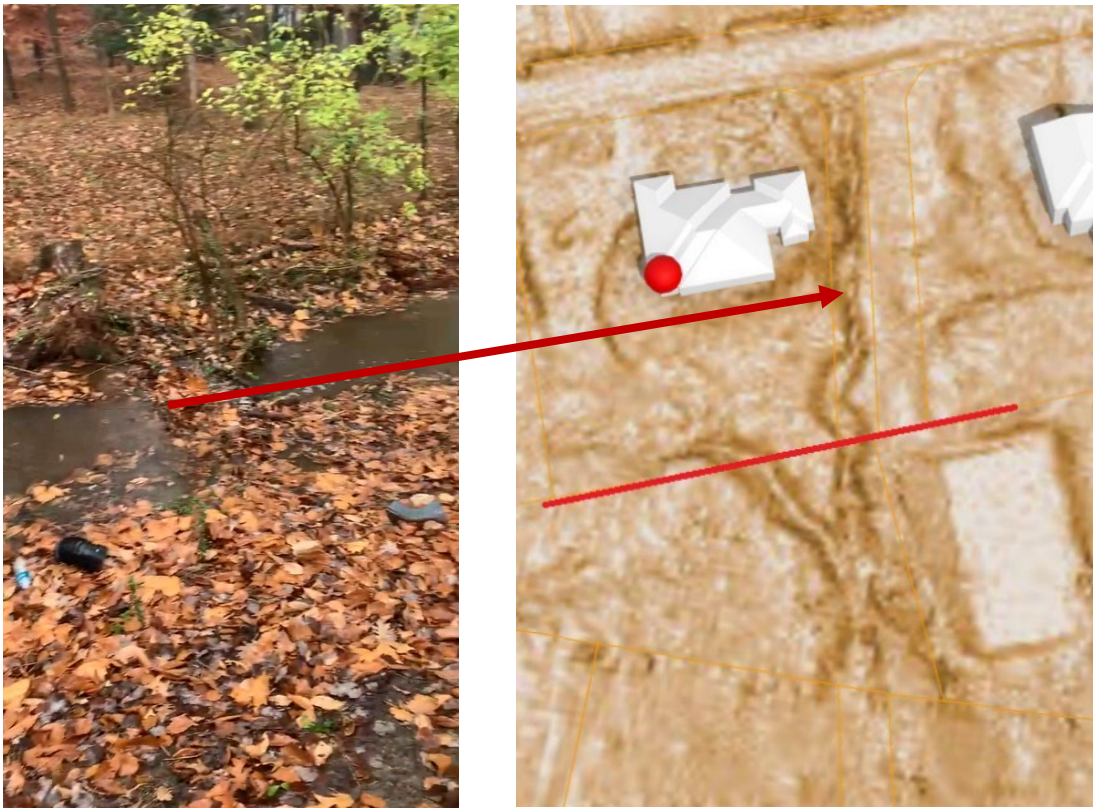
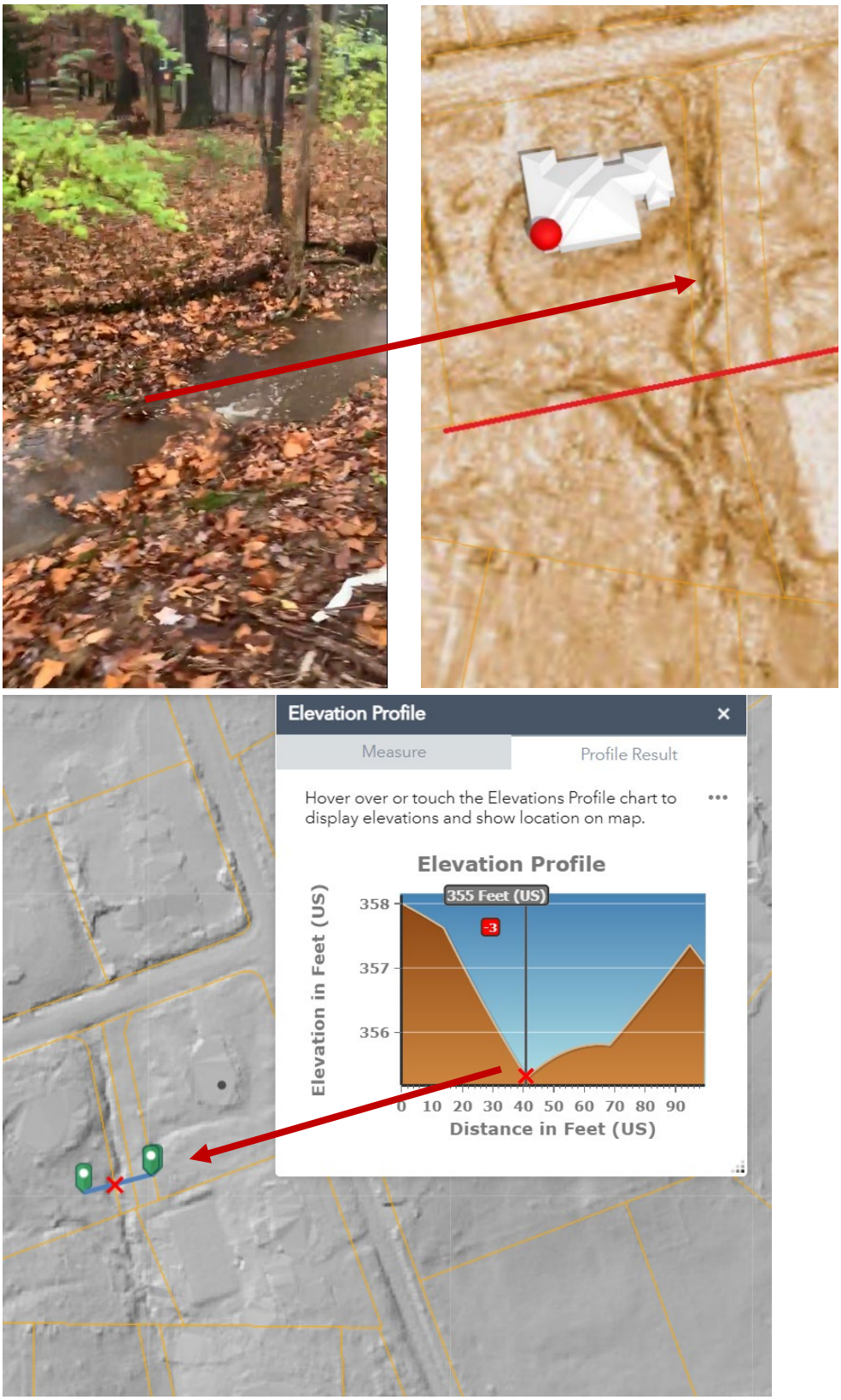
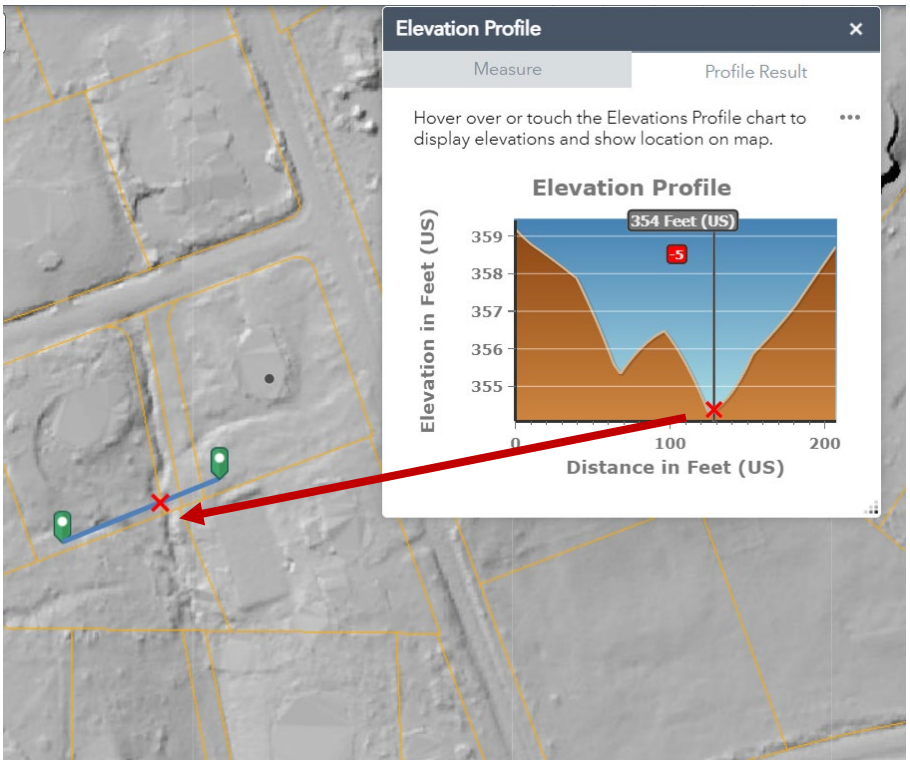
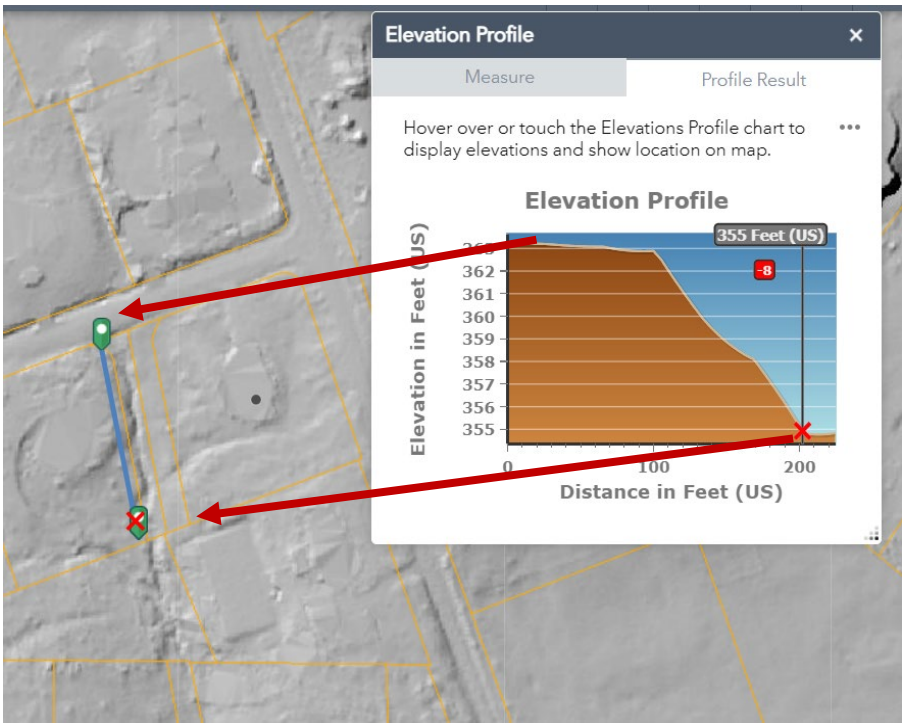


Figure 4. Sinuous Channel




Elevation Profile
Measure
Profile Result
Hover over or touch the Elevations Profile chart to display elevations and show location on map.
Elevation Profile
355 Feet (US)
358
357
356
Elevation in Feet (US)
0 10 20 30 40 50 60 70 80 90
Distance in Feet (US)


Elevation Profile
Measure
Profile Result
Hover over or touch the Elevations Profile chart to display elevations and show location on map.
Elevation Profile
354 Feet (US)
-5
Elevation in Feet (US)
359
358
357
356
355
0
100
200
Distance in Feet (US)


Elevation Profile
Measure
Profile Result
Hover over or touch the Elevations Profile chart to display elevations and show location on map.
Elevation Profile
355 Feet (US)
-8
Elevation in Feet (US)
362
361
360
359
358
357
356
355
0
100
200
Distance in Feet (US)

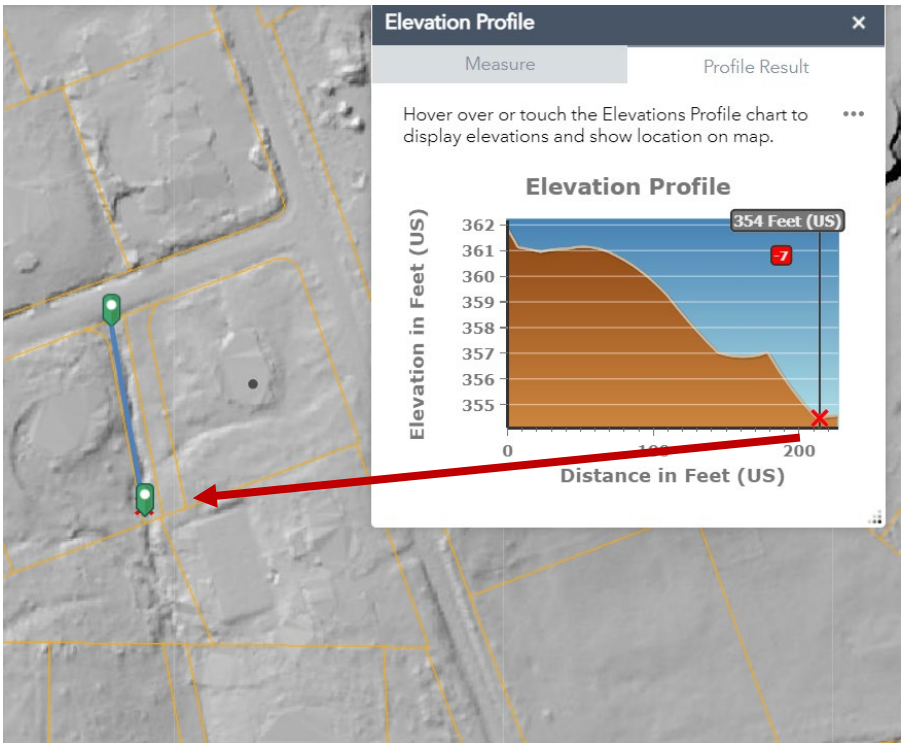


Figure 5. Well-Defined Channel Banks and Bed

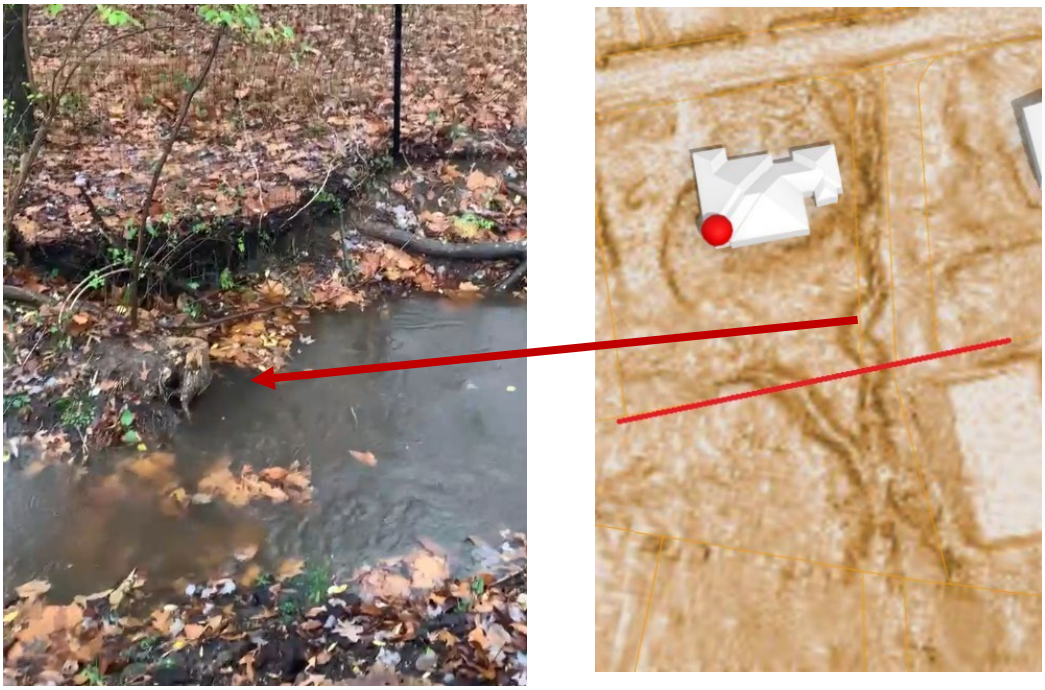


Figure 6. Fluctuating High-Water Marks

Figure 7. Evidence of Scouring

Figure 8. Transient Leaf Litter

Figure 9. Wetland or Hydrophytic Vegetation

Figure 10. Hydric Soil Indicators

Figure 11. Underground Water Presence[1]: Water welling up from the ground (Field Visit by Planning Staff on April 25, 2024)

Figure 12. Algae-covered or Water-stained Rocks[1] (Field Visit by Planning Staff on April 25, 2024)

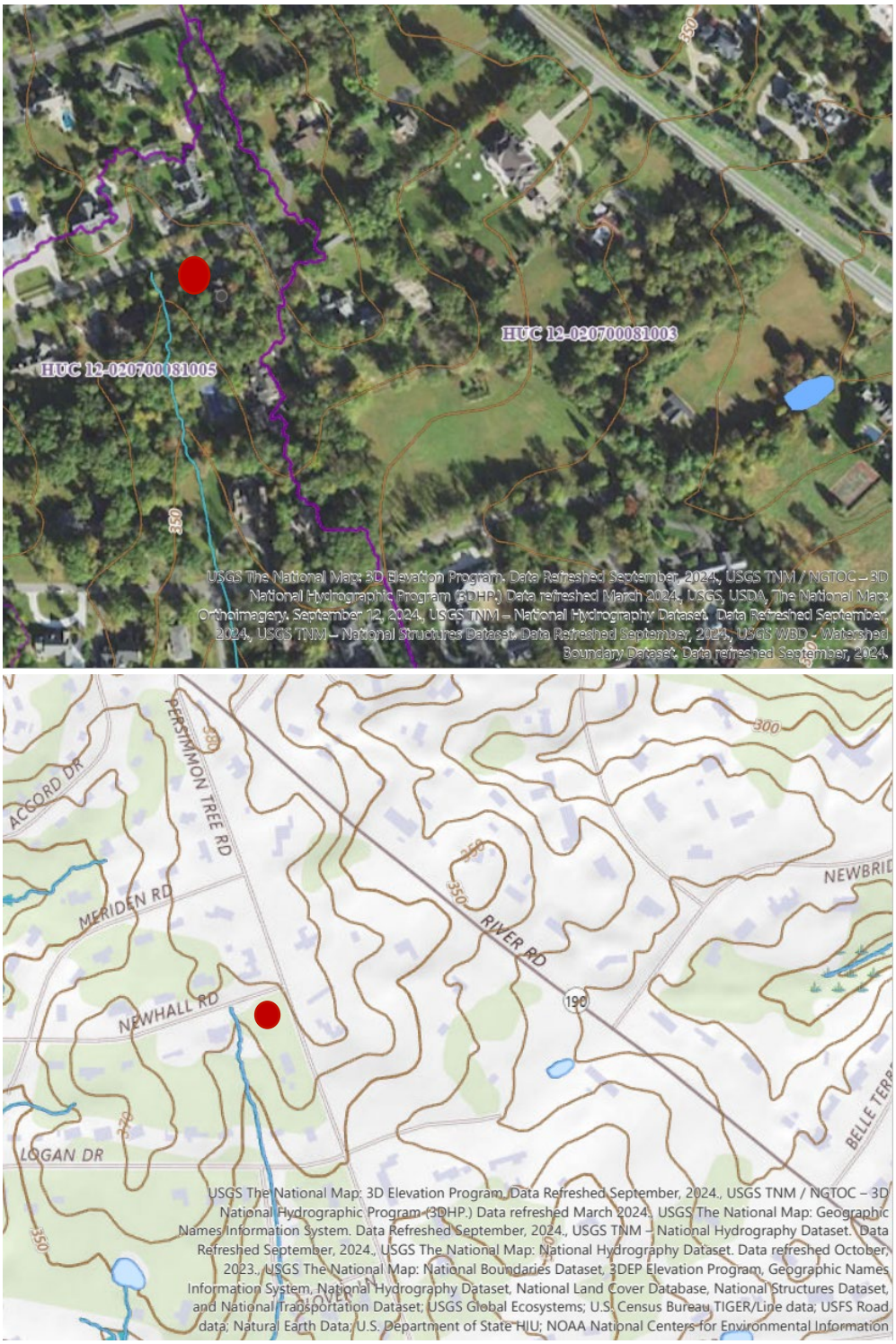


Figure 13. USGS Map

Table 1. Precipitation Data, April 2023

Climatological Data for DALECARLIA RESERVOIR, DC - April 2024

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2024-04-01	66	46	56.0	6.1	9	0	0.09	0.0	0
2024-04-02	66	46	56.0	5.7	9	0	0.36	0.0	0
2024-04-03	52	47	49.5	-1.2	15	0	0.04	0.0	0
2024-04-04	M	M	M	M	M	M	S	M	M
2024-04-05	56	37	46.5	-5.1	18	0	0.05A	0.0	0
2024-04-06	54	40	47.0	-5.0	18	0	0.00	0.0	0
2024-04-07	55	36	45.5	-6.9	19	0	0.00	0.0	0
2024-04-08	M	M	M	M	M	M	S	M	M
2024-04-09	73	38	55.5	2.3	9	0	0.00A	0.0	0
2024-04-10	78	32	55.0	1.4	10	0	0.00	0.0	0
2024-04-11	78	38	58.0	4.0	7	0	0.00	0.0	0
2024-04-12	M	M	M	M	M	M	S	M	M
2024-04-13	71	53	62.0	7.2	3	0	0.03A	0.0	0
2024-04-14	66	43	54.5	-0.7	10	0	0.00	0.0	0
2024-04-15	83	43	63.0	7.4	2	0	0.00	0.0	0
2024-04-16	84	53	68.5	12.5	0	4	0.00	0.0	0
2024-04-17	76	50	63.0	6.6	2	0	0.00	0.0	0
2024-04-18	76	50	63.0	6.3	2	0	0.00	0.0	0
2024-04-19	M	M	M	M	M	M	S	M	M
2024-04-20	M	M	M	M	M	M	M	M	M
2024-04-21	M	M	M	M	M	M	M	M	M
2024-04-22	M	M	M	M	M	M	M	M	M
2024-04-23	63	36	49.5	-9.0	15	0	0.00A	0.0	0
2024-04-24	72	36	54.0	-4.8	11	0	0.00	0.0	0
2024-04-25	73	50	61.5	2.4	3	0	0.00	0.0	0
2024-04-26	73	42	57.5	-1.9	7	0	0.00	0.0	0
2024-04-27	73	42	57.5	-2.2	7	0	0.00	0.0	0
2024-04-28	58	52	55.0	-5.0	10	0	0.00	0.0	0
2024-04-29	75	55	65.0	4.7	0	0	0.00	0.0	0
2024-04-30	90	52	71.0	10.4	0	6	0.00	0.0	0
Sum	1611	1017	-	-	186	10	0.57	0.0	-
Average	70.0	44.2	57.1	1.5	-	-	-	-	0.0
Normal	67.6	43.6	55.6	-	305	23	3.53	0.0	-

Table 2. Precipitation Data, December 2022

Climatological Data for DALECARLIA RESERVOIR, DC - December 2022

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2022-12-01	57	28	42.5	0.7	22	0	0.00	0.0	0
2022-12-02	44	25	34.5	-7.0	30	0	0.00	0.0	0
2022-12-03	51	26	38.5	-2.8	26	0	0.25	0.0	0
2022-12-04	63	35	49.0	8.0	16	0	0.25	0.0	0
2022-12-05	62	25	43.5	2.8	21	0	0.00	0.0	0
2022-12-06	62	25	43.5	3.0	21	0	0.02	0.0	0
2022-12-07	51	39	45.0	4.8	20	0	0.22	0.0	0
2022-12-08	M	M	M	M	M	M	M	0.0	0
2022-12-09	57	36	46.5	6.8	18	0	0.00	0.0	0
2022-12-10	49	28	38.5	-1.0	26	0	0.00	0.0	0
2022-12-11	42	29	35.5	-3.8	29	0	0.00	0.0	0
2022-12-12	46	33	39.5	0.5	25	0	0.05	0.0	0
2022-12-13	42	30	36.0	-2.8	29	0	0.00	0.0	0
2022-12-14	42	23	32.5	-6.1	32	0	0.00	0.0	0
2022-12-15	41	26	33.5	-4.8	31	0	0.60	0.0	0
2022-12-16	43	33	38.0	-0.1	27	0	1.55	0.0	0
2022-12-17	50	30	40.0	2.1	25	0	0.00	0.0	0
2022-12-18	46	34	40.0	2.3	25	0	0.00	0.0	0
2022-12-19	43	27	35.0	-2.5	30	0	0.00	0.0	0
2022-12-20	40	24	32.0	-5.2	33	0	0.00	0.0	0
2022-12-21	40	22	31.0	-6.0	34	0	0.00	0.0	0
2022-12-22	45	22	33.5	-3.3	31	0	0.00	0.0	0
2022-12-23	54	32	43.0	6.4	22	0	1.99	0.0	0
2022-12-24	42	10	26.0	-10.4	39	0	0.00	0.0	0
2022-12-25	41	10	25.5	-10.8	39	0	0.00	0.0	0
2022-12-26	32	15	23.5	-12.6	41	0	0.00	0.0	0
2022-12-27	32	25	28.5	-7.4	36	0	0.00	0.0	0
2022-12-28	40	22	31.0	-4.7	34	0	0.00	0.0	0
2022-12-29	49	26	37.5	1.9	27	0	0.00	0.0	0
2022-12-30	55	28	41.5	6.1	23	0	0.00	0.0	0
2022-12-31	65	29	47.0	11.8	18	0	0.00	0.0	0
Sum	1426	797	-	-	830	0	4.93	0.0	-
Average	47.5	26.6	37.1	-1.2	-	-	-	-	0.0
Normal	46.9	29.6	38.3	-	829	0	3.81	0.8	-

Table 3. Precipitation Data, December 2023

Climatological Data for DALECARLIA RESERVOIR, DC - December 2023

Date	Temperature				HDD	CDD	Precipitation	New Snow	Snow Depth
	Maximum	Minimum	Average	Departure					
2023-12-01	56	29	42.5	0.7	22	0	0.00	0.0	0
2023-12-02	49	36	42.5	1.0	22	0	0.20	0.0	0
2023-12-03	55	45	50.0	8.7	15	0	0.75	0.0	0
2023-12-04	55	40	47.5	6.5	17	0	0.00	0.0	0
2023-12-05	55	32	43.5	2.8	21	0	0.00	0.0	0
2023-12-06	49	34	41.5	1.0	23	0	0.00	0.0	0
2023-12-07	43	28	35.5	-4.7	29	0	0.00	0.0	0
2023-12-08	46	28	37.0	-3.0	28	0	0.00	0.0	0
2023-12-09	57	30	43.5	3.8	21	0	0.00	0.0	0
2023-12-10	57	30	43.5	4.0	21	0	0.00	0.0	0
2023-12-11	60	33	46.5	7.2	18	0	1.55	0.5	1
2023-12-12	46	26	36.0	-3.0	29	0	0.00	0.0	0
2023-12-13	45	25	35.0	-3.8	30	0	0.00	0.0	0
2023-12-14	49	24	36.5	-2.1	28	0	0.00	0.0	0
2023-12-15	47	25	36.0	-2.3	29	0	0.00	0.0	0
2023-12-16	54	25	39.5	1.4	25	0	0.00	0.0	0
2023-12-17	M	M	M	M	M	M	S	M	M
2023-12-18	56	46	51.0	13.3	14	0	2.10A	0.0	0
2023-12-19	56	35	45.5	8.0	19	0	0.00	0.0	0
2023-12-20	57	26	41.5	4.3	23	0	0.00	0.0	0
2023-12-21	56	26	41.0	4.0	24	0	0.00	0.0	0
2023-12-22	56	26	41.0	4.2	24	0	0.00	0.0	0
2023-12-23	48	32	40.0	3.4	25	0	0.00	0.0	0
2023-12-24	46	36	41.0	4.6	24	0	0.05	0.0	0
2023-12-25	50	37	43.5	7.2	21	0	0.00	0.0	0
2023-12-26	M	M	M	M	M	M	S	M	M
2023-12-27	M	M	M	M	M	M	M	M	M
2023-12-28	54	46	50.0	14.3	15	0	0.87A	0.0	0
2023-12-29	57	40	48.5	12.9	16	0	0.00	0.0	0
2023-12-30	58	34	46.0	10.6	19	0	0.05	0.0	0
2023-12-31	49	35	42.0	6.8	23	0	0.00	0.0	0
Sum	1466	909	-	-	625	0	5.57	0.5	-
Average	52.4	32.5	42.4	4.1	-	-	-	-	0.0
Normal	46.9	29.6	38.3	-	829	0	3.81	0.8	-

SECTION 6: POTENTIAL WITNESSES

Jason K. Sartori, Montgomery County Planning Department

Robert Kronenberg, Montgomery County Planning Department

Patrick Butler, Montgomery County Planning Department

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Christina Sorrento, Montgomery County Planning Department

Josh Kaye, Montgomery County Planning Department

Domenic Bello, Montgomery County Planning Department

Ariel Zelaya, Montgomery County Planning Department

Amy Lindsey, Montgomery County Planning Department

Mark Symborski, Montgomery County Planning Department

Marco Fuster, Montgomery County Planning Department

Mark Etheridge, Montgomery County Department of Permitting Services

Steve Simpson, Montgomery County Department of Permitting Services

Sherryl Mitchell, Montgomery County Department of Permitting Services

Tom Weadon, Montgomery County Department of Permitting Services

SECTION 7: ATTACHMENTS

Attachment A - Notice of Requirements dated February 12, 2024

Attachment B - Extension for NRI/FSD Application No. 420240850 Notice of Requirements dated February 21, 2024

Attachment C - Applicant's letter dated March 26, 2024

Attachment D - Applicant's letter dated March 31, 2024

Attachment E - Staff's PowerPoint presentation dated February 8, 2024

Attachment F - Maryland Department of the Environment Letter dated January 5, 2024

Attachment H – Director's response to the Applicant's request to reconsider dated July 23, 2024

Attachment G - NRI/FSD Denial Letter dated August 16, 2024